IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN N. JOHNSON, Appellant, vs. PEOPLE OF THE STATE OF CALIFORNIA, Appellee.	)	No. 21219

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

JAMES A. AIELLO
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-3259

Attorneys for Appellee

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for writ of habeas corpus was invoked under Title 28, United States Code sections 1915, 2241, 2243, and 2254. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant has appealed from an order of the United States District Court for the Northern District of California, denying his petition for a writ of habeas corpus.

A. Proceedings in the State Courts

On July 2, 1964, appellant pleaded guilty to violating section 274 of the California Penal Code (abortion). He was subsequently sentenced to serve the term prescribed by law (TR 2, 12, 29-30, 35[1]/; AOB 2). There was no appeal.

At some time subsequent thereto, appellant filed a Motion to Vacate in the Superior Court for Alameda County, said motion being denied on December 8, 1964 (TR 2, 12; AOB 2). He appealed that denial to the District Court of Appeals for the State of California, First Appellate District, which court on September 15, 1965, dismissed the appeal without prejudice to the filing of a petition for a writ of habeas corpus (TR 2-3, 12; AOB 2). A petition for hearing in the California Supreme Court was thereupon filed, said petition being denied on November 10, 1965 (TR 2-3, 12; AOB 3)

Appellant then filed applications for the writ of habeas corpus in the Superior Court for the County of Marin and in the California Supreme Court, both of which were denied without comment (TR 5-6, 13; AOB 3).

B. Proceedings in the Federal Courts

On February 9, 1966, appellant filed a petition for habeas corpus in the United States District Court for the

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1. "TR" refers to the transcript of record on the proceedings in the District Court.

Northern District of California (TR 1-26; AOB 3). An Order to Show Cause issued (TR 28), appellee filed a return thereto (TR 29-35), and appellant filed his traverse (TR 43-54). The Honorable George B. Harris, Chief Judge, denied the petition by an order filed on May 6, 1966 (TR 55-57).

On June 6, 1966, Chief Judge Harris granted petitioner's application for a certificate of probable cause and for leave to appeal in forma pauperis (TR 63).

Notice of appeal was filed on July 12, 1966 (TR 64-65).[2/]

SUMMARY OF APPELLEE'S ARGUMENT

I. Appellant's plea of guilty forecloses collateral attack of his conviction on the grounds that it resulted from illegally obtained evidence.

II. Appellant has failed to allege facts showing a coerced plea of guilty.

III. Appellant has not shown that he received ineffective aid of counsel.

ARGUMENT

I

APPELLANT'S PLEA OF GUILTY FORECLOSES COLLATERAL ATTACK OF HIS CONVICTION ON THE GROUNDS THAT IT RESULTED FROM ILLEGALLY OBTAINED EVIDENCE.

Appellant repeats here on appeal basically the

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2. Appellant's notice of appeal was not timely filed, see Rule 37 (a), Federal Rules of Criminal Procedure.

same facts and allegations with reference to an alleged "coerced" confession that he made in the court below. The only notable difference is that in this Court, he cites People v. Dorado, 62 Cal.2d 338 (1965) (AOB 7-8).

Of course, in so doing, he completely overlooks (or disregards) the fact that because of his plea of guilty, he is foreclosed from collaterally attacking his conviction on the ground that statements made by him to police officers were obtained by illegal means. Harris v. United States, 338 F.2d 75, 80 (9th Cir. 1964); United States v. French, 274 F.2d 297 (7th Cir. 1960); United States v. Sturm, 180 F.2d 413 (7th Cir. 1950); Kinney v. United States, 177 F.2d 895 (10th Cir. 1949). (TR 55).

II

APPELLANT HAS FAILED TO ALLEGE FACTS SHOWING A COERCED PLEA OF GUILTY

The opinion of the District Court, in its order denying appellant's petition, discusses appellant's claim of a "coerced" plea of guilty in detail, and, we submit, completely disposes of that issue on this appeal (TR 56-57).[3/]

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3. "Petitioner also maintains that his plea of guilty was 'coerced.' According to petitioner he confessed after a police officer had informed him 'that failure to do so would result in petitioner being charged of one count of conspiracy to commit an abortion and one count of abortion; that the other two men would be charged of one count of conspiracy to commit abortion; and that petitioner's pregnant wife would be charged

It is noteworthy that appellant does not allege any newer or different facts in reference to the circumstances which assertedly were coercive which would counter the correctness of the opinion of the District Court. If anything, appellant may be said to have abandoned his claim, because, save for the bare allegation contained in his "Argument" preface (AOB 5-6), he makes no reference to the "coerced" plea in the body of the brief on appeal.

III

APPELLANT HAS NOT SHOWN THAT HE RECEIVED INEFFECTIVE AID OF COUNSEL

As with the prior allegations, the instant contention is but a condensed version of the identical question brought

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with the possession of the narcotics found, and subsequently petitioner's infant daughter would be turned over to the juvenile authorities. Nevertheless, petitioner alleges, he then entered a plea of not guilty to the one count of criminal abortion with which he was charged. The police officer then informed petitioner that unless the plea was changed to guilty his wife would be charged with narcotic violations and petitioner might be charged with more than one count of abortion. After that, and on advice of counsel, petitioner entered his plea of guilty.

To believe petitioner, it must be assumed that the consequences originally outlined to him by the police were sufficient to secure a confession but not to produce a plea of guilty, and that the subsequent lesser consequences outlined to him by the police did result in a coerced plea of guilty even after consultation with counsel. A claim of coercion must be based on more convincing allegations. Hodge v. Heinze, 165 F.Supp. 726, 729 (N.D. Cal. 1958).

Furthermore, such allegations establish no coercion whatsoever. See Cortez v. United States, 337 F.2d 699 (9th Cir. 1964)."

before the District Court below and resolved against appellant (TR 23-25, 55-56). The essence of this argument is that the public defender erred when he advised appellant to withdraw his plea of guilty "even though he had earlier informed appellant that the circumstances of the arrest was a good defense." (AOB 9). Appellant does not show that the "circumstances of the arrest" actually constituted a good defense which was omitted through error of counsel, or that counsel was "so incompetent or inefficient as to make the trial a farce or a mockery of justice." He has thus failed completely to show ineffective aid of counsel, and his conclusionary allegations must be disregarded. Reid v. United States, 334 F.2d 915, 919 (9th Cir. 1964); Schlette v. California, 284 F.2d 827 (9th Cir. 1960).

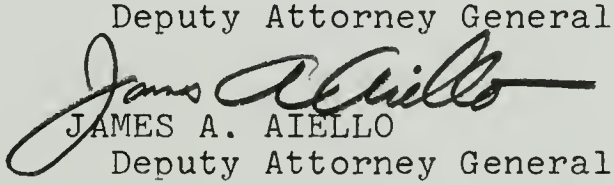
CONCLUSION

For the reasons stated above, it is respectfully submitted that the order of the District Court denying appellant's petition for the writ of habeas corpus should be affirmed.

DATED: October 17, 1966

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General



JAMES A. AIELLO
Deputy Attorney General

JAA:cmd
CR SF
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Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED:

JAMES A. AIELLO
Deputy Attorney General
of the State of California